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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 ReBath LLC,

10 Plaintiff,

11 v.

12 HD Solutions LLC, *et al.*,

13 Defendants.
14

No. CV-19-04873-PHX-JJT

ORDER

15 At issue is the admissibility of expert testimony provided by Mr. Lesovitz on behalf
16 of HD Solutions LLC (“HDS”). The Court considers Plaintiff’s Rule 702/*Daubert* Motion
17 to Exclude Defendant’s Expert Joseph W. Lesovitz (Doc. 155, Mot.), Defendant’s
18 Response (Doc. 168, Resp.), and Plaintiff’s Reply (Doc. 178, Reply). It finds this matter
19 appropriate for decision without oral argument. *See* LRCiv 7.2(f).

20 **I. BACKGROUND**

21 **A. Brief Summary of Facts**

22 This matter began with a contract dispute between ReBath, a franchisor of bathroom
23 remodeling services and related products, and HDS, their former franchisee in the San
24 Antonio market. (Doc. 160, Def.’s Statement of Facts (“DSOF”) ¶ 1, 6; Doc. 162, Pl.’s
25 Statement of Facts (“PSOF”) ¶ 1, 2.) From 2007 until June 2019, HDS sold ReBath’s
26 products and did business under the name “ReBath of San Antonio.” (DSOF ¶ 5.) As part
27 of the franchise agreement, HDS used “RB Direct,” a marketing and database software, to
28 store and develop a list of prospective and existing customers. (PSOF ¶ 34; DSOF ¶ 29-31.)

1 This list included each person's name, address, details about sales, financial information,
2 and how they discovered HDS. (DSOF ¶ 32.)

3 By 2018, the relationship between ReBath and HDS began to sour. (PSOF ¶ 6.) That
4 spring, they entered arbitration pursuant to their second amended franchise agreement.
5 (PSOF ¶ 1, 6; DSOF ¶ 34.) The arbitrator granted HDS the right to terminate its franchise
6 agreement with ReBath. (DSOF ¶ 38; PSOF ¶ 8.) The arbitrator's final award specified
7 that, upon termination, ReBath was to "divest" itself of HDS's customer data and, on
8 receipt of that data, HDS was required to remove ReBath's mark from all materials or
9 property. (PSOF ¶ 36; DSOF ¶ 53.)

10 HDS elected to terminate the franchise agreement, effective June 30, 2019. (PSOF
11 ¶ 11; DSOF ¶ 40.) ReBath did not contest the termination and the separation of the parties
12 proceeded. (*See generally* PSOF; DSOF ¶ 41.) ReBath took steps to provide HDS with its
13 customer data and HDS began to rebrand its business as "Legacy Bath & Kitchen." (*See*
14 *generally* PSOF; DSOF ¶ 44, 59.) Both parties now claim that the break was not clean and
15 that the opposing party has breached its obligations under the arbitrator's final award.
16 (PSOF ¶ 13; Doc. 158, Def.'s Mot. for Summ. J. ("DMSJ") 3:5-6.)

17 ReBath alleges that HDS has failed to disassociate itself from ReBath by, among
18 other things, using the ReBath mark on business cards, trucks, uniforms, its website,
19 various communication channels, and a sign on the exterior of its business locations stating
20 that "Re-Bath is now Legacy Bath & Kitchen." (PSOF ¶ 13.) ReBath has brought Lanham
21 Act claims for trademark infringement under 15 U.S.C. § 1114 and false designation of
22 origin under *id.* § 1125(a)(1)(A), along with state law claims for trade secret infringement,
23 cybersquatting, and breach of contract. (Doc. 159, Pl.'s Mot. for Summ. J. ("PMSJ") 1:3-
24 8, 6:26-27.)

25 HDS alleges that ReBath illegally retained a copy of its customer data and provided
26 it to ReBath's new franchisee in San Antonio, Texas Design. (DMSJ 3:5-6, 14:1-2.) As a
27 franchisee of ReBath, Texas Design has had access to RB Direct since late 2019. (DSOF
28 ¶ 79.) HDS alleges that Texas Design has been given access to its customer data via ReBath

1 and RB Direct. (DMSJ 15:14-16, 16:22-23.) Based on these allegations, HDS brought a
 2 counterclaim against ReBath for misappropriation of trade secrets under the Federal
 3 Defend Trade Secrets Act. (DMSJ 16:25-26.)

4 **B. Mr. Lesovitz's Opinions**

5 HDS retained Mr. Lesovitz to calculate damages on its counterclaims and rebut the
 6 report submitted by ReBath's expert, Mr. Cook (the "Cook Report") as to ReBath's
 7 damages. (Mot. at 3.) His findings are detailed in three reports: (1) an initial report, (2) a
 8 rebuttal report and (3), a supplemental report (together the "Lesovitz Reports"). (Mot. at 3.)
 9 These reports offer Mr. Lesovitz's opinion as to HDS's damages, whether Texas Design
 10 exploited HDS's data, and his criticisms of Mr. Cook's report on ReBath's damages under
 11 its Lanham Act claims. (Mot. at 3.) Mr. Lesovitz was not proffered as expert on liability.
 12 (Resp. at 12.) However, in his report he expressed opinions as to whether Texas Design
 13 obtained sales using HDS's customer data. (Reply at 5.)

14 To calculate the damages that ReBath would owe if it is found liable, Mr. Lesovitz
 15 compared HDS's and Texas Design's customer data to find characteristics that indicated
 16 Texas Design had accessed HDS's data. (Mot. at 5-6.) If Mr. Lesovitz identified a person
 17 in Texas Design's data that had any of the following characteristics relating to HDS, he
 18 considered them to have originated from HDS: (1) bearing the same name as a person in
 19 HDS's data, (2) bearing the same address as a person in HDS's data, (3) having
 20 "appointment source" information indicating that the person in Texas Design's data found
 21 the company through a channel associated with HDS, such as "Google SA," or (4) having
 22 an "appointment taker" that had never worked for Texas Design and was associated with
 23 HDS. (Mot. at 6-8; Resp. at 7-9; Doc. 172-3 at 8 (sealed).) Mr. Lesovitz considered all
 24 people he identified using the "appointment source" and "appointment taker"
 25 characteristics to have originated from HDS, even where that person did not have a match
 26 in HDS's data. (Mot. at 7-8.) Mr. Lesovitz then tallied Texas Design's sales relating to the
 27 identified records to calculate HDS's total lost revenue and two damages estimates: (1)
 28 total lost profits and (2) disgorgement damages. (Mot. at 6, 9-10.)

1 Finally, Mr. Lesovitz's rebuttal report ("the Rebuttal Report") criticizes the Cook
 2 Report's calculation of ReBath's trademark infringement damages. (Mot. at 10.)
 3 Mr. Lesovitz raises several concerns regarding the Cook Report. First, he takes issue with
 4 the fact that it does not consider testimony by Texas Design's principle, Mr. Sidhu, which
 5 he believes demonstrates Texas Design's use of HDS's data.¹ (Mot. at 10.) Second, he
 6 criticizes the report's failure to establish a causal link between HDS's alleged use of
 7 ReBath's mark and actual harm suffered by ReBath, or to deduct costs or apportion revenue
 8 from other sources in its calculation of HDS's profits to be awarded to ReBath as damages.
 9 (Mot. at 11.)

10 II. LEGAL STANDARD

11 Under Rule 702, an expert may testify on the basis of their "scientific, technical, or
 12 other specialized knowledge" if it "will help the trier of fact to understand the evidence,"
 13 provided the testimony rests on "sufficient facts or data" and "reliable principles and
 14 methods," and "the witness has reliably applied the principles and methods to the facts of
 15 the case." Fed. R. Evid. 702(a)-(d). The trial judge acts as the "gatekeeper" of expert
 16 witness testimony by engaging in a two-part analysis. *Daubert v. Merrell Dow*
 17 *Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 592 (1993). First, the trial judge must determine
 18 that the proposed expert witness testimony is based on scientific, technical, or other
 19 specialized knowledge. *Id.*; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).
 20 Second, the trial court must ensure that the proposed testimony is relevant—that it "will
 21 assist the trier of fact to understand or determine a fact in issue." *Id.* "Evidence is relevant
 22 if it has any tendency to make a fact more or less probable than it would be without the
 23 evidence and the fact is of consequence in determining the action." Fed. R. Evid. 401.

24 The *Daubert* analysis is applicable to testimony concerning non-scientific areas of
 25 specialized knowledge. *Kumho Tire Co., Ltd.*, 526 U.S. at 141. However, the *Daubert*
 26 factors may not apply to testimony that depends on the knowledge and experience of the

27 ¹ Mr. Sidhu's testimony did not occur until two days after Mr. Cook issued his report. (Mot.
 28 at 10.) Mr. Cook did not amend or supplement his report to account for this new testimony.
 (Resp. at 13-14.)

1 expert, rather than a particular methodology. *United States v. Hankey*, 203 F.3d 1160, 1169
 2 (9th Cir. 2000) (citation omitted) (finding that *Daubert* factors do not apply to police
 3 officer’s testimony based on 21 years of experience working undercover with gangs). An
 4 expert qualified by experience may testify in the form of opinion if his or her experiential
 5 knowledge will help the trier of fact to understand evidence or determine a fact in issue, as
 6 long as the testimony is based on sufficient data, is the product of reliable principles, and
 7 the expert has reliably applied the principles to the facts of the case. *See* Fed. R. Evid. 702;
 8 *Daubert*, 509 U.S. at 579.

9 “The inquiry envisioned by Rule 702” is “a flexible one.” *Daubert*, 509 U.S. at 594.
 10 “The focus . . . must be solely on principles and methodology, not on the conclusions that
 11 they generate.” *Id.* The advisory committee notes on the 2000 amendments to Rule 702
 12 explain that Rule 702 (as amended in response to *Daubert*) “is not intended to provide an
 13 excuse for an automatic challenge to the testimony of every expert.” *See Kumho Tire*, 526
 14 U.S. at 152. “Vigorous cross-examination, presentation of contrary evidence, and careful
 15 instruction on the burden of proof are the traditional and appropriate means of attacking
 16 shaky but admissible evidence.” *Daubert*, 509 U.S. at 595 (citation omitted). Disputes as
 17 to the credentials, methodology, or basis for an expert’s opinion generally “go to the
 18 weight, not the admissibility, of his testimony.” *Kennedy v. Collagen Corp.*, 161 F.3d 1226,
 19 1231 (9th Cir. 1998) (quoting *McCulloch v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d
 20 Cir.1995)).

21 **III. ANALYSIS**

22 ReBath moves to exclude the Mr. Lesovitz’s opinions as embodied in the Lesovitz
 23 Reports, arguing that the methodology underlying his calculation of HDS’s lost profits is
 24 flawed, he is mistaken as to facts throughout his opinion, and his Rebuttal Report is
 25 undermined by misunderstandings of the law. (Mot. at 1-2.) With few exceptions, ReBath’s
 26 arguments are unpersuasive. ReBath’s concerns about the accuracy of the Lesovitz Reports
 27 largely go to “the weight, not the admissibility, of [the] testimony.” *Id.* The proper means
 28 to challenge his testimony is “vigorous cross-examination, presentation of contrary

evidence, and careful instruction on the burden of proof”—not a *Daubert* motion. *Daubert*, 509 U.S. at 595.

A. Mr. Lesovitz’s Opinion Regarding HDS’s Lost Profits

ReBath raises issues with the reliability, methodology, and helpfulness of Mr. Lesovitz’s opinion on HDS’s lost profits. (Mot. at 1-2, 12.) The Court will address each argument in turn.

ReBath first challenges the reliability of the Lesovitz Reports’ conclusions about Texas Design’s and HDS’s data. ReBath contends that the reports use deposition testimony to incorrectly conclude that Texas Design used HDS’s customer data to make sales and, therefore, the report’s conclusions as a whole are unreliable.² (Mot. at 12.) However, the Lesovitz Reports reference testimony from the same deposition as evidence to the contrary.³ (Resp. at 9.) In addition, Mr. Lesovitz bases his conclusion that Texas Design exploited HDS’s data on an analysis of shared characteristics in the data, including names, addresses, and appointment takers. (*Id.* At 7-8.)

Mr. Lesovitz does not draw his conclusions from thin air. He can point to “sufficient facts or data” underlying the report’s conclusion that Texas Design exploited HDS’s data. Fed. R. Evid. 702(b). A motion to exclude expert testimony should not “replace the adversary system” by resolving basic factual disputes. *U.S. v. 14.38 Acres of Land Situated in LeFlore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). Mr. Lesovitz’s conclusions as detailed in his reports will not be excluded on this basis. ReBath is, of course, free to challenge Mr. Lesovitz’s opinions and his bases for them on cross examination or by presenting contrary evidence.

ReBath also argues that the Lesovitz Reports rely on information that they did not disclose and therefore should be excluded. (Reply at 4.) This argument fails. Nothing in the reports that indicates that Mr. Lesovitz’s opinion relies on undisclosed data.

² ReBath points to Mr. Sidhu’s testimony that Texas Design started “absolutely from scratch... in everything we did.” (Mot. at 13.)

³ In contrast, the Lesovitz Reports quote Mr. Sidhu saying that “if a prospect had spoken to somebody in the prior ReBath franchise and [left information with them], there was a chance that that was information we saw.” (Resp. at 9.)

1 Rule 26 requires a written report by an expert witness to disclose all the “facts or
2 data considered” in forming their opinion. Fed. R. Civ. P. 26(a)(2)(B)(ii). If the rule is
3 violated, exclusion of the opinion may be warranted. *Id.* 37(c)(1).

4 In its reply, ReBath seizes on HDS’s mention of a set of approximately 60 .csv files
5 to argue that the Lesovitz Reports relied on information that was not disclosed. (Reply
6 at 4.) HDS acknowledged in its response that its full customer list goes beyond the three
7 Excel files discussed by ReBath and includes the 60 .csv files. (Resp. at 6.) From this,
8 ReBath contends that Mr. Lesovitz relied on the 60 .csv files in his reports but did not
9 disclose his reliance on these files, thus denying ReBath the opportunity to ask him about
10 them in his deposition. (Reply at 4.)

11 The Court cannot agree with ReBath’s argument. Mr. Lesovitz’s reports explicitly
12 describe the data he considered and repeatedly cite to attached summaries of that data. (*See*,
13 *e.g.*, Resp. at 10.) Mr. Lesovitz’s supplemental report in fact discloses these 60 .csv files
14 as documents that he considered. (Resp. at 7; Doc 172-3 (sealed).) In any event, ReBath
15 deposed Mr. Lesovitz on August 10, 2021. (Doc. 168-6 at 3.) HDS disclosed the 60 .csv
16 files by email on March 17, 2021 and Mr. Lesovitz disclosed his consideration of these
17 files in his rebuttal report dated April 2nd, 2021, and then again in his supplemental report
18 dated August 2nd, 2021. (Doc. 172-2 (sealed); Doc. 168-3 at 1; Resp. at 5-6.) If ReBath
19 wished to ask Mr. Lesovitz about these files, it had ample opportunity to do so. Because
20 Mr. Lesovitz disclosed all facts and data considered in producing his reports his testimony
21 cannot be excluded on Rule 26 grounds.

22 ReBath also raises concerns about Mr. Lesovitz’s methodology, namely that he uses
23 assumptions based on nothing more than *ipse dixit* to draw conclusions about HDS’s lost
24 profits. (Mot. at 6.) The Court understands ReBath’s concerns but cannot agree with its
25 conclusion that Mr. Lesovitz’s testimony should be excluded.

26 ReBath has colorable concerns about Mr. Lesovitz’s method of calculating HDS’s
27 lost profits. It points out that, in forming his opinion, Mr. Lesovitz makes significant leaps.
28 First, he assumes that any person in Texas Design’s data with a characteristic (whether

1 based on name, address, appointment source, or appointment taker) linked to a person in
 2 HDS's data is the result of Texas Design's exploitation of HDS's data. (*See, e.g.*, Mot. at
 3 6.) Second, he assumes that any sale made to such a person would not have occurred but
 4 for Texas Design's exploitation of HDS's data. (Mot. at 7.)

5 While the assumptions create an optimistic calculation of HDS's lost profits, they
 6 are allowable. Mr. Lesovitz's analysis of HDS and Texas Design's data is based on
 7 "reliable principles and methods" insofar as such a complex analysis can be. Fed. R. Evid.
 8 702(c). While grounds exist to criticize his approach and the assumptions underlying his
 9 conclusions, "the inquiry envisioned by Rule 702" is "a flexible one." *Daubert*, 509 U.S.
 10 at 594. Assumptions are an unavoidable ingredient in financial models and ReBath has not
 11 attacked Mr. Lesovitz's qualifications to make such assumptions.⁴ Mr. Lesovitz's
 12 testimony about HDS's lost profits will not be excluded. Again, the proper means to attack
 13 his methods and assumptions is through "vigorous cross-examination, presentation of
 14 contrary evidence, and careful instruction on the burden of proof." *Id.* at 596.

15 Finally, ReBath contends that Mr. Lesovitz's lost profits calculations are unhelpful
 16 because they involve little more than noting that similar names, addresses, and other
 17 information appears in both data sets. (Mot. at 9). The Court does not agree.

18 Mr. Lesovitz's report compares and summarizes 40,000 rows of data. (Mot. at 10.)
 19 This analysis most will certainly "help the trier of fact to understand the evidence." Fed.
 20 R. Evid. 702(a). Indeed, without access to software and training, performing this analysis
 21 is "beyond the understanding of the average lay person." *U.S. v. Frazier*, 387 F.3d 1244,
 22 1262 (11th Cir. 2004); *see also, e.g., F.C.T. v. BurnLounge, Inc.*, 753 F.3d 878, 889 (9th
 23 Cir. 2014) (finding that the trial court did not abuse its discretion when it admitted expert
 24 testimony that interpreted the defendant's sales data); *Alaska Rent-A-Car Inc. v. Avis*

25 ⁴ Among other things, Mr. Lesovitz is a "Certified Public Accountant, Certified Fraud
 26 Examiner, Accredited in Business Valuation, Certified in Financial Forensics, and holds
 27 the Chartered Financial Analyst Designation." (Resp at 5.) ReBath has not challenged these
 28 qualifications. (Resp. at 11.; *see generally* Mot.)

1 *Budget Group, Inc.*, 738 F.3d. 960 (9th Cir. 2013) (concluding that expert testimony that
2 analyzed financial data to produce a damages estimate was properly admitted).

3 Like the expert testimony in *BurnLounge* and *Alaska Rent-A-Car*, Mr. Lesovitz
4 digests complex financial information and produces conclusions that are helpful. Mr.
5 Lesovitz's opinion is based on comparison of multiple data sets and goes far beyond
6 "simple math." *Triad Cap. Mgmt., LLC v. Priv. Equity Cap. Corp.*, 2010 WL 10076450, at
7 *3 (N.D. Ill. Nov. 22, 2010). Mr. Lesovitz's opinions will not be excluded.

8 **B. Mr. Lesovitz's Opinion on the Value of Disgorgement Damages**

9 ReBath asks that Mr. Lesovitz's opinion on disgorgement damages be excluded
10 because "a jury can do simple math and read." (Mot. at 10.) *Triad Cap. Mgmt., LLC*, 2010
11 WL 10076450, at *3. The final calculation is simple and will be excluded, but the
12 underlying lost revenue figure will be admitted.

13 If expert testimony merely goes to matters which the finder of fact "is capable of
14 understanding and deciding without the expert's help" such testimony should be excluded.
15 *U.S. v. Castillo*, 924 F.2d 1227 (2d Cir. 1991) (quoting *Andrews v. Metro-North Commuter*
16 *R.R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989)). Courts have repeatedly excluded expert
17 testimony that involves nothing more than "simple math." *Triad Cap. Mgmt.*, 2010 WL
18 10076450, at *3 (excluding expert testimony calculating the sum of "eight line-items of
19 expenses"); *Master-Halco, Inc. v. Scillia, Dowling & Ntarelli, LLC*, 2010 WL 2978289,
20 at *3 (D. Conn. Apr. 9, 2010) (excluding expert testimony where the expert subtracted one
21 number from another and multiplied the result by an interest rate).

22 Mr. Lesovitz's final disgorgement figure is merely ReBath's royalty percentage rate
23 multiplied by the total lost revenue figure he calculated. (Mot. at 10.) This is "simple math"
24 indistinguishable from the calculations in *Triad Cap. Mgmt.* and *Master-Halco, Inc.* While
25 this calculation is fair game for counsel to argue, any testimony by Mr. Lesovitz regarding
26 his opinion of HDS's total disgorgement damages must be excluded. However, the
27 underlying lost revenue opinion (detailed in his lost profits methodology) is based on his
28 detailed analysis of HDS's and Texas Design's data and will not be excluded.

1 **C. ReBath’s Contention That Mr. Lesovitz Improperly Opines on Liability**

2 ReBath argues that Mr. Lesovitz’s opinions that Texas Design may have obtained
3 sales by exploiting HDS’s data should be excluded because, in offering such an opinion,
4 he is opining on liability. (Mot. at 14-15.) This argument appears to confuse Mr. Lesovitz’s
5 opinion as to damages with the separate legal issue of whether ReBath is liable as a matter
6 of law. Rule 702 explicitly limits expert testimony to “evidence or... fact[s] in issue.” Fed.
7 R. Evid. 702(a). Questions of law, on the other hand, are the “exclusive and distinct
8 province of the trial judge.” *U.S. v. Weitzenhoff*, 35 F.3d 1275, 1277 (9th Cir. 1993) quoting
9 *United States v. Brodie*, 858 F.2d 492, 496 (9th Cir. 1988) (overruled on other grounds).⁵

10 The Court has no trouble finding that Mr. Lesovitz’s opinions do not reach questions
11 of law. He is not proffered as a liability expert. (Resp. at 12.) Mr. Lesovitz necessarily had
12 to identify which sales he believed resulted from Texas Design’s exploitation of HDS’s
13 data to calculate damages. (Resp. at 12.) ReBath’s liability depends on its legal right to use
14 HDS’s customer data, not simply whether Texas Design (an entity that is not a party to this
15 suit) obtained and used that data. Mr. Lesovitz may opine about whether data was taken
16 from HDS’s customer list based on his experience as a fraud examiner without reaching
17 questions of law. He may not, of course, testify as to whether such a conclusion makes
18 ReBath liable to HDS.

19 ReBath argues that, alternatively, Mr. Lesovitz’s opinions should be excluded
20 because he is simultaneously offered as a fact and expert witness. To support this
21 contention, ReBath cites *U.S. v. W.R. Grace*, 455 F.Supp.2d 1148 (D. Mont. 2006). There,
22 a witness was to testify as an expert regarding his scientific conclusions in a letter he sent
23 to the defendant and, simultaneously, as a fact witness on the impact of the letter. *Id.* at
24 1155. The trial court concluded that the witness could not be used for both purposes—
25 expert and factual testimony—without confusing or prejudicing the jury. *Id.*

26 ⁵ Nevertheless, even if expert testimony uses legal terms or concepts, it may still be
27 admissible. *Hangartner v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir.
28 2004) (concluding that expert testimony on the legal issue of bad faith was properly
admitted because the expert did not reach a legal conclusion and the testimony was
helpful).

1 W.R. *Grace* is easily distinguishable. Mr. Lesovitz is not offered as a fact witness
 2 with direct knowledge of the impact of his report at HDS, ReBath, or Texas Design, or of
 3 business operations at those entities. He is offered as an expert witness to interpret
 4 extensive sales and customer data. (Mot. at 3, 5-6.) To produce his damages estimate he
 5 must opine on which sales, if any, resulted from Texas Design's use of HDS's data. (Resp.
 6 at 12.) His opinion on whether Texas Design used HDS's data will not be excluded on
 7 these grounds.

8 **D. ReBath's Challenges to Mr. Lesovitz's Rebuttal Report**

9 Finally, ReBath moves to exclude the Rebuttal Report on the grounds that it is
 10 unreliable. (Mot. at 10.) ReBath's arguments are twofold: (1) that Mr. Lesovitz unfairly
 11 faults Mr. Cook for not considering evidence unavailable to him, and (2) that the Rebuttal
 12 Report misunderstands how damages are calculated under the Lanham Act. (Mot. at 10;
 13 Reply at 8-9.)

14 The Rebuttal Report criticizes the Cook Report for failing to consider evidence
 15 pointing to Texas Design's use of HDS's data, particularly testimony by Texas Design's
 16 principal, Mr. Sidhu. (Mot. at 10.) ReBath fairly points out that the final Cook Report could
 17 not have considered Mr. Sidhu's testimony because it occurred two days after the Cook
 18 Report was issued. (Mot. at 10.) Yet Mr. Cook could have considered other evidence in the
 19 record concerning Texas Design's potential use of HDS's data.⁶ Alternatively, Mr. Cook
 20 could have produced a supplemental report. (Resp. at 14.) He has done neither of these
 21 things, thus Mr. Lesovitz's criticisms "logically advance a material aspect" of HDS's case
 22 and are therefore helpful. *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007). Mr.
 23 Lesovitz's criticisms as set forth in his Rebuttal Report are admissible and subject to cross
 24 examination.

25 Mr. Lesovitz's supposed misunderstandings of the law in the Rebuttal Report are a
 26 more complex issue. ReBath cites dicta from the Southern District of New York supporting

27 ⁶ The Lesovitz Reports cite emails from Texas Design that were available to Mr. Cook as
 28 evidence that Texas Design used HDS's data. (Resp. at 14.)

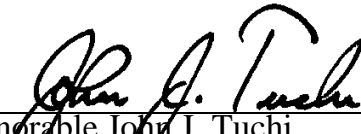
1 the proposition that testimony which misunderstands the law should be excluded. (Mot. at
2 11-12.) *River Light V, LP v Lin & J Intern, Inc.* No. 13CV3669 DLC, 2015 WL 3916271,
3 at *4 n.3 (S.D.N.Y. June 25, 2015). The District of Nevada agrees that such
4 misunderstandings are fatal where they infect the entirety of the expert's testimony. *Baskim*
5 *Holdings Inc. v. Two M, Inc.*, No. 216CV01898APGGWF, 2018 WL 4880758, at *1 (D.
6 Nev. June 8, 2018) (holding that an expert's damages estimate starting from the incorrect
7 date was based on a misunderstanding of the law and should be excluded).

8 Mr. Lesovitz's Rebuttal Report does not appear to be based on a misunderstanding
9 of the law so fundamental as to infect his entire opinion. He calculates HDS's costs and
10 unrelated revenue to be deducted from ReBath's damages. (Resp. at 13.) As ReBath points
11 out, it is the defendant's burden to prove such deductions under the Lanham Act. *4 Pillar*
12 *Dynasty LLC v. New York & Company, Inc.*, 933 F.3d 202, 214 n. 11 (2d Cir. 2019). Yes,
13 Mr. Lesovitz frames these deductions as a criticism of the Cook Report and its failures to
14 calculate ReBath's damages. (Resp. at 13.) But a criticism is simply not equivalent to a
15 legal opinion. Mr. Lesovitz's deductions of HDS's costs and apportionment of unrelated
16 revenue is helpful to the jury in determining what damages, if any, should be awarded to
17 ReBath. Mr. Lesovitz's opinion of ReBath's damages as set forth in his Rebuttal Report
18 will not be excluded.

19 ReBath's argument, however, is not entirely without merit. His criticism of the Cook
20 Report for failing to establish that ReBath suffered actual harm caused by HDS is based on
21 a misunderstanding of the law and will be excluded. "Nothing in the Lanham Act
22 conditions an award of profits on plaintiff's proof of harm." *TrafficSchool.com Inc. v.*
23 *Edriver Inc.*, 653 F.3d 820 (9th Cir. 2011). Any expert testimony inferring that such a
24 showing is required may confuse the jury, and is simply wrong. Questions of law are the
25 "exclusive and distinct province of the trial judge." *Weitzenhoff*, 35 F.3d at 1277. Any legal
26 conclusion that Mr. Lesovitz offers—correct or incorrect—will not be permitted.

1 **IT IS THEREFORE ORDERED** granting in part and denying in part Defendant's
2 Rule 702/*Daubert* Motion to Preclude Mr. Lesovitz's Expert Opinions (Doc. 155; Doc. 172
3 sealed).

4 Dated this 7th day of July, 2022.

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7 _____
8 Honorable John J. Tuchi
9 United States District Judge
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